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Supreme Court of the United States

OCTOBER TERM, 1962

No. 940

L. LLOYD CROSBY,
Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,
Respondents.

BRIEF IN BEHALF OF RESPONDENT S. STEWART CROSBY OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent S. Stewart Crosby—*the plaintiff and moving party* in the courts below—respectfully submits that the petition for writ of certiorari should be denied because:

1. The case, stated correctly, does not present a question which merits the Court's consideration; and

2. Petitioner has no standing to complain of the vacatur of an injunction which had been granted (a) in respondent Crosby's individual—and *not class*—action, (b) to which Petitioner was not a party of record, (c) on a cause of action or grievance which Petitioner did not in any way share, and (d) which Petitioner could not allege as a ground for relief to him.

The Case and Questions Stated Accurately

Petitioner misconceives the questions presented by this case.

The moving party in the courts below was the person in whose favor, as plaintiff, a perpetual injunction had been granted on the defendant's, Bradstreet's, consent. He was not a restrained party seeking to be relieved of the restraint or to escape liability for violation thereof. The injunction did not in any way restrain him.

A party in whose favor an injunction is entered may waive his rights thereunder or discharge it precisely as one in whose favor a money judgment is entered (*Rehill* v. *Rehill*, 304 N. Y. 126 (1953); *Frederick* v. *Frederick*, 5 A D 2d 783 (N. Y. 1958)). So completely dependent upon the will of a plaintiff and his adherence thereto is the continuation of an injunction, that his consent to conduct, contrary to the injunction, not only immunizes the restrained party from judicial punishment; such consent may be "so inconsistent with the spirit of the decree as to call for its vacatur" notwithstanding reservations attached to the consent (*Dictograph Products Inc.* v. *Empire State Hearing Aid Bureau, Inc.*, 4 A D 2d 508, 511-12 (N. Y. 1957)).

In this case, on the written consent of the defendant and the record plaintiff and no one else, the defendant (The Bradstreet Company and its successor, Dun & Bradstreet, Inc.) was enjoined from

> "issuing or publishing *any* report, comment or statement either in writing or otherwise concerning S. Stewart Crosby, the plaintiff herein, L. Lloyd Crosby, Henry A. Grossberg, Bernard Crosby, DuPree Freres Inc. and the American Fur Breeders Cooperative Marketing Association Inc. or concerning the business activities of any of the foregoing persons or corpora-

tions, whether present, past *or future*." (Emphasis supplied.)

It will be noted that the injunction was not limited to untruthful or unfair publication. Nor was it limited to defamatory matter. Nor to past events. It included judicial proceedings, future as well as past. If any of the named persons committed and were convicted, before or after the date of the injunction, of bank robbery or multi-million dollar fraud or arson or murder or fraudulent bankruptcy, or even died, defendant was restrained from publicizing such fact, and the restraint was forever.

The Injunction Was a Judicial Monstrosity

Nowhere has there been found a parallel to such an injunction, to one so shocking in its substance and sweep or so malfeasant in purpose and effect. Its purpose and effect, the petition concedes (impliedly if not explicitly) were to mislead businessmen to extend credit which they would withhold and to engage in transactions from which they would abstain, if the suppressed facts were known to them. Thereby, the court was used as an instrumentality of—and in effect and result became a party to—fraudulent concealment. It is the vacatur of such an injunction that petitioner argues was inequitable and against good conscience.

The fact that parties consented to such a perversion of the judicial process does not make it proper or justify it. Completely fallacious is the concept that the consent of parties validates anything that a court does on such consent (see p. 6, *infra*). Suppose a defendant in a civil suit were to consent to imprisonment as if convicted of felony or to a decree of enslavement or peonage to the plaintiff or to perpetual restraint from engaging anywhere in the world in a common occupation or to be discrimi-

nated against because of his race or color or religion, would it be said, in any of those instances, that a court is required *or may* enter the requested decree?

It is inconceivable that the late Judge Bondy would have signed the order had he sensed the purpose and effect thereof. The stipulation did not contain a full or adequate disclosure. It did no more than indicate that the plaintiff had been unjustly libelled and defendant was agreeing to make amends by paying the paltry sum of $300 and agreeing to refrain from repetition. Superficially, the stipulation and proposed order appeared innocent and appropriate. To be sure, a careful reading would have raised questions; but consented to applications, especially where the parties or one of them are or is of recognized repute, normally—and occasionally, as in this case, unfortunately—are examined very cursorily.

Doubtless, if the true nature of the order ever had come to the attention of Judge Bondy, he would have felt outraged and would have peremptorily vacated it.

The Court of Appeals could not do otherwise, when the true nature of the order came to its attention. Naturally, it could perceive no "equity in [the present petitioner's] position since he requests the continuation of an injunction which should never have been entered in the first place."

That is what District Judge Sugarman overlooked when he refused to vacate the injunction on the ground that "the harm which will befall L. Lloyd Crosby [the present petitioner] if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff" (5a). He failed to recognize that "the harm" would be the publication of the truth, the concealment of which from the interested business community was a fraud upon them. Also he overlooked that L. Lloyd Crosby, the present petitioner, accomplished that fraud by utilizing the error in the defendant's report concerning the plaintiff, his brother,

as a vehicle to procure through a suit by the plaintiff an injunction to suppress the damaging truth concerning himself (Lloyd) for the purpose, by such suppression of the truth, of procuring or inducing credit and business which he feared would be withheld if the truth were published.

It seems to the undersigned that citation of authority is not necessary to demonstrate that such a scheme is not one which a court of the United States should have fructified by the exercise of its equity powers or should continue by refusing to exercise its control over its judgments.

The Vacatur of the Injunction Does Not Require the Invocation of the Constitution

The Court of Appeals did not rest its decision on the ground that the injunction violated either the plaintiff's or the defendant's constitutional right to free speech or free press. What the Court said was that the injunction was so repulsive to our basic notions of freedom of information, as exemplified and sanctified by the First Amendment, that no Court should enter or continue a decree such as Judge Bondy—unwittingly, it is fair to presume—signed on July 8, 1933. Can there be any reasonable disagreement with that? The consent of the parties, as already stated, is irrelevant to the consideration of whether the substance of the decree was at war with constitution and law; courts are not bound by the consent of litigants; a court does not have to enter whatever decree parties may consent to; it should enter only such decrees as it is satisfied are proper and would be, in the absence of the consent of the parties, within the court's proper exercise of power.

No Contract Stands in the Way of Vacatur

It is immaterial whether or not the stipulation was a contract, for surely the decree was not a contract in any sense of the term (*U. S.* v. *Swift & Co.*, 286 U. S. 106, 115-116 (1931); *System Federation, etc.* v. *Wright*, 364 U. S. 642 (1960)).

Moreover, contracts are not binding, if they are illegal or contrary to public policy. Furthermore, since there was no pact between the defendant and the petitioner, the latter's rights as a third-party beneficiary (if there were here a contract), would have been subordinate to the rights, will and conduct of the plaintiff as the promisee party, not the converse as asserted by petitioner (see *Alexander* v. *Equitable Life Assurance Society*, 233 N. Y. 300 (1922); *Gennett* v. *Smith*, 244 App. Div. (N. Y. 1935) 3).

It seems too plain to require argument that public policy is violated by a contract to suppress from businessmen record facts which the commercial world regards material to the extension of credit and by such suppression to mislead businessmen to extend credit which they would withhold if the suppressed facts were known to them. Even when (as not here) supported by a laudable motive, it may well be doubted that a contract unreasonably restraining the right freely to speak and publish the truth, would be enforcible; it is suggested that such contracts are in the same class as other unreasonable or unconscionable or restrictive or negative covenants and undertakings, such as not to engage in an occupation or to be another's slave or surrendering other basic and constitutionally protected human rights (e.g., *Shelley* v. *Kraemer*, 334 U. S. 1 (1948); *Barrows* v. *Jackson*, 346 U. S. 249 (1953); *Murray* v. *Cooper*, 268 App. Div. 411, aff'd 294 N. Y. 658 (1945); *Clark Paper & Manufacturing Co.* v. *Stenacher*, 236 N. Y. 312 (1923).

Petitioner Had and Has No Standing to Object to the Vacatur

In addition, it is submitted that, as one who was not a party to the suit which resulted in the injunction and could not have been a party because he was not in any way actionably aggrieved and had no equities in his favor, petitioner L. Lloyd Crosby had and has no standing to interfere with the normal unilateral right of the plaintiff as the holder of a judgment to discharge it.

The question is not as in *Drummond* v. *U. S.*, 324 U. S. 316 (1945), and in *Minneapolis Honeywell Regulator Co.* v. *Thermoco, Inc.*, 116 F. 2d 845 (1941),* whether petitioner was "bound" by the order. The question is whether petitioner, not a party of record to the judgment, has standing to interfere with the normal rights of the holder of a judgment. The following observation of Judge Hand in the *Minneapolis-Honeywell Regulator Co.* case cited by petitioner is highly apposite: "If the [non-parties] had wished to enjoy the privileges of a party, they should have been parties if they could. If they could not, *a fortiori*, they should not have the privileges of a party" (at p. 848).

Petitioner is in the position of *one who could not have been a party*. If plaintiff was merely "fronting" for Lloyd, the fact is that it was only through plaintiff as one who personally was aggrieved by reason of the wrong to himself (since Lloyd had not been wronged) that Lloyd could achieve his purpose; never was Lloyd in a position to ask that he be substituted as the plaintiff or to be added as a plaintiff. Since Lloyd's interests not only were not, but could not have been, considered at the time of the in-

* Incidentally, in each of those cases the behind the scene party was held not bound.

junction, they are barred from being considered now. Having no rights of his own, Lloyd cannot help having to abide by whatever his "front" elects to do.

Furthermore, even if, because he caused to be included in the restraint the reporting on Lloyd and others, it reasonably could be held that the plaintiff lost the absolute control over the continuation of the injunction which as sole plaintiff he otherwise would have, it certainly does not follow that the court was bound to refuse the plaintiff's application simply because it would deprive Lloyd of a judicial shield from the truth which never should have been given to him and which no court of the United States ever should give to anyone.

No case has been cited in which termination or relaxation of an injunction was refused when sought by the party who procured the injunction.

The Decision of the Court of Appeals is Not in Conflict With Any Prior Decision Anywhere

In re George F. Nord Building Corp., 129 F. 2d 173 (7th Circ.), c. d. 317 U. S. 670 (1943), is not in point. There a restrained party who had consented to the injunction and then violated it, appealed from an adjudication of contempt of court. The restraint in that case was limited both in scope and time: during the pendency of reorganization proceedings, the court in charge thereof enjoined the sending of any general written communications to the creditors of the debtor or to the shareholders of the corporation formed to continue the debtor's business "without first having such communication approved by this court". A party so enjoined upon his consent, without moving to vacate it, and without submitting to the court for its approval the communication which he desired to make, circularized a communication in direct violation of the injunction. The Court of Appeals construed the pro-

hibition of "general written communications" as meaning "communications relating to the reorganization, not to irrelevant communications" because "Surely, the lower court did not intend to enter a ridiculous order, but rather an order designed to protect the plan of reorganization". The Court of Appeals noted further that it did not have before it "a cause of one not a party to the record". Nor did it have before it an application by the party who had procured the injunction.

Similarly, in *Halstead* v. *Securities & Exchange Commission*, 182 F. 2d 660, c. d. 340 U. S. 834 (1950), and in *National Labor Relations Board* v. *Federbush Co.*, 121 F. 2d 954 (2d Cir., 1941), the restraints were very temporary and for a special transitory purpose; the first of these did no more than restrain the solicitation of fees and had nothing to do with information, and the second was to prevent unlawful influencing of an election.

In *U. S.* v. *Lorain Journal Co.*, 342 U. S. 143 (1951) and *U. S.* v. *Associated Press*, 326 U. S. 1 (1945), the injunctions, respectively, restrained refusals to publish and to disseminate—the direct converse of prohibiting publication.

Without synposizing any of the other cases cited in the petitioner's brief, it suffices to say that not one of them presents a parallel to the injunction in this case and not one of them constitutes or presents an argument against the patently laudable decision which the Court of Appeals rendered in this case.

Petitioner's Impugning of the Plaintiff's Motives is Without Substance and is Irrelevant

The Court of Appeals vacated the injunction because its substance was offensive to the administration of justice and for that reason the injunction never should have been

entered. Consequently, plaintiff's motive in calling the improvident injunction to the court's attention and asking for its vacatur is immaterial.

Moreover, petitioner's charges were expressly denied by the plaintiff, who requested the District Judge to hold a hearing thereon if the charges were to affect his decision (25a, 28a, 34a). It is apparent from the District Court's decision (4a-5a) that it ignored the charges and determined the application *solely* on the balancing of "the harm which will befall L. Lloyd Crosby if the relief sought is granted" against "the benefits that may accrue therefrom to the plaintiff". The Court of Appeals also ignored the charges.

The charges were ignored because they were immaterial to the issue of the intrinsic propriety of the injunction as a judicial process. Moreover, those charges could not withstand the scrutiny of logic. Since the restraint was solely against Dun & Bradstreet and not the plaintiff or anybody else, if petitioner was motivated by "hatred" and desire to "wreck" his brother's business, he could have and would have published and circulated, in a variety of ways, the concealed true facts appearing in public records. The plaintiff could have procured publication in the reports of reporting and rating agencies other than Dun & Bradstreet; indeed, he could have caused petitioner harm by widespread publication of these vacatur proceedings. Obviously, he very effectively could have reeked hatreds and destruction through channels other than Dun & Bradstreet. The absence of a suggestion of any such conduct proves that the charges were the product of an imagination bent on creating an "atmosphere" hostile to the application and of sympathy for the opponent thereto.

Conclusion

Whether the District Court in 1933 acted in excess of or beyond its "jurisdiction" or "power" or only erroneously, is, for the purposes of this case, immaterial. The controlling fact is that the nature, substance and effect of the decree are such that its entry was an incredible perversion of the judicial function and, therefore, regardless of who moved or opposed its vacatur or when, the court's inherent power over its own processes was, in vindication thereof, most urgently called to action as soon as the Court became conscious of the scope and intent and effect of the order of July 8, 1933.

The petition, it is respectfully submitted, should be denied.

Respectfully submitted,

COPAL MINTZ,
Attorney for S. Stewart Crosby.

April 9, 1963.